No. 02-711

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IN THE

Supreme Court of the United States

HELEN MOORE, *et al.*,

Petitioners,

v.

SCHOOL REFORM BOARD OF THE CITY OF DETROIT, DAVID ADAMANY, Chief Executive Officer of the Detroit Public Schools, DENNIS ARCHER, Mayor of The City of Detroit, and JOHN ENGLER, Governor of the State of Michigan,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SCHOOL REFORM BOARD OF THE CITY OF DETROIT, DAVID ADAMANY, CHIEF EXECUTIVE OFFICER OF THE DETROIT PUBLIC SCHOOLS, AND DENNIS ARCHER, MAYOR OF THE CITY OF DETROIT

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QUESTION PRESENTED

Does § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, apply to Michigan's School Reform Legislation, Public Act 10 of 1999, which provides that in school districts of 100,000 or more students school board members shall be appointed by the mayor of the city within which the school district is located rather than elected?

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STATEMENT OF THE CASE

Detroit Public Schools ("DPS") has been an educational system in distress for decades. Attempting to address the troubling state of affairs at DPS, the Michigan Legislature mandated school reform through the enactment of 1999 Public Act 10 ("PA 10"). Public Act 10 suspended the old elected Detroit Public School Board ("Old Board") and created a new seven-member Detroit Public School Reform Board ("Reform Board"), six of whom are appointed by the Mayor of the City of Detroit, Defendant Dennis Archer.

Displeased with the state's school reform legislation, Petitioners filed suit in the United States District Court for the Eastern District of Michigan. Petitioners alleged that PA 10 violated: (1) provisions of the Michigan Constitution; (2) the Fourteenth and Fifteenth Amendments; and (3) § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 ("VRA"). Petitioners include residents of the City of Detroit and various incorporated and unincorporated associations of Detroit residents. Respondents are the School Reform Board of the City of Detroit; David Adamany, then-Chief Executive Officer of the Detroit Public Schools; Dennis Archer, then-Mayor of the City of Detroit; and John Engler, then-Governor of the State of Michigan.

Following a period of discovery, Respondents filed motions for summary judgment, and Petitioners filed a motion for partial summary judgment. On October 25, 2000, United States District Judge Nancy Edmunds issued an Opinion and Order granting summary judgment in favor of Respondents and dismissing all of Petitioner's statutory and constitutional claims. (Memorandum Opinion and Order) (R. 84) (hereinafter "D Ct Op").

On June 12, 2002, the Sixth Circuit Court of Appeals issued a careful opinion affirming the District Court decision. (Sixth Circuit Opinion and Judgment) (hereinafter "6th Cir Op"). On August 9, 2002, the Sixth Circuit denied Petitioners' motion for rehearing *en banc*. In their petition before this Court, Petitioners ask only for a review of the lower courts' dismissal of their VRA claim. Specifically, Petitioners ask this Court to review the scope and coverage of § 2 of the VRA and hold that § 2 applies to a shift from an elective to an appointive process for school boards.

The Court of Appeals fully considered Petitioners' VRA claim. Petitioners argued that PA 10 violates § 2 because it denies Detroit voters, who are predominately African American, the right to elect their school board while allowing other Michigan citizens to continue to vote for their school board members. Petitioners urged the Court of Appeals to overrule its prior decision in *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999), in which the court held that § 2 does not apply to a shift from an elective to an appointive system for filling school board positions. Petitioners also argued that in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("Bossier Parish II"), this Court read § 2 of the Act more broadly than § 5. Petitioners asserted that because changes from elective to appointive systems are subject to § 5's preclearance requirement, § 2 applies to such changes as well. Petitioners argued, therefore, that *Mixon* is no longer valid.

Rejecting Petitioners' arguments and affirming the district court's determination that Petitioners failed to state a claim under § 2, the Court of Appeals correctly explained that the Supreme Court's decision in *Bossier Parish II* does not alter the reasoning employed in *Mixon*. The Court of Appeals distinguished *Bossier Parish II* on the basis that it

dealt only with § 5 and did not involve an appointive process. In reaffirming the *Mixon* analysis, the Court of Appeals followed the approach taken by all other federal courts addressing this issue in holding that § 2 applies only to elective offices, not appointive offices. In response to Petitioners' argument that §§ 2 and 5 are the same, the Court of Appeals noted that § 5 applies only in jurisdictions with a history of discriminatory voting practices, whereas § 2 applies in all jurisdictions to prohibit voting practices that have a discriminatory effect. The court also noted that Petitioners' challenge to an appointive system for filling school board positions must fail because citizens do not have a fundamental right to elect school board members.

For the reasons stated herein, this Court should uphold the lower courts' entry of judgment for Respondents and deny the petition for certiorari as lacking in merit.

COUNTER-STATEMENT OF FACTS

A. The State of The Detroit Public Schools Prior to Public Act 10: "Old" Detroit School Board Fails to Respond to Urgent Needs of Detroit Public Schools.

In 1997, New Detroit, Inc., a non-profit organization dedicated to improving the social and economic status of Detroiters, initiated a comprehensive study of the Detroit Public Schools with the goal of providing specific recommendations for improvement. A Review Panel reported its findings to the Detroit Board of Education in place at the time. After investing hundreds of hours studying DPS' operations, the Panel found "an immediate need for a fundamental restructuring of DPS' organization and for dramatic changes in the way people do their jobs at every level of the system." (Exhibit A in support of Def.'s motion for summary judgment, A Plan for Fundamental Change, at

10, Apx. at 235 (R. 66)). The resulting recommendations were unequivocal; change must begin immediately:

> To accomplish the changes contemplated by the Panel, the DPS must launch its restructuring without delay and continue the hard work consistently for years to come. Failure to take decisive action now will further erode the system's credibility and, eventually, cost it the community's faith and backing.

(Exhibit A in support of Defendants' motion for summary judgment, A Plan for Fundamental Change, at 3, Apx. at 228 (R. 66)).

Despite the fact that the Review Panel found serious problems in the governance, administration, management, finance, and operations of DPS and despite the fact that DPS students scored poorly on achievement tests and suffered from a high dropout rate compared to their peers statewide; the Old Board was slow to implement change. (D Ct Op, at 45a.) Although the Old Board appointed an Implementation Team to institute New Detroit, Inc.'s recommendations, the Review Panel expressed its view that "[t]he structure of DPS and the nature of the restructuring challenges, however, have significantly slowed the pace of action on many of the major objectives." (6th Cir Op, at 4a.)

B. PA 10 Imposes Sweeping Changes in the Governance of Detroit Public Schools.

Faced with continuing inaction after yet another study of DPS, a district charged with the duty of educating ten percent (10%) of Michigan's students, the Legislature acted to mandate reform. (D Ct Op, at 6.) On March 26, 1999, the Legislature through 1999 Public Act 10 ("PA 10"), M.C.L. § 380.371 *et seq.*, amended the Michigan School Code to

establish school reform boards of qualifying school districts, which are defined as a school district with a pupil population of 100,000 or more. M.C.L. § 380. 402.[1] Under the Act, the Old Board for all practical purposes was dismissed[2] and replaced by a new Reform Board consisting of six appointees made by the Mayor of the City of Detroit, with the seventh member being the Superintendent of Public Instruction or his designee. M.C.L. §§ 380.372(1) & (2).

Further, the Legislature provided that the Reform Board would select a CEO, and upon the appointment of the CEO, "all provisions of this Act [the School Code] that would otherwise apply to the elected School Board of the qualifying school district shall apply to the Chief Executive Officer." M.C.L § 380.373(4). Once appointed, the CEO assumes the executive and rule-making powers of the District.[3]

The Legislature's stated purpose in enacting PA 10 — improving the educational opportunities of ten percent (10%) of Michigan's students — was summarized by bill sponsor Senator Dan De Grow:

> There are approximately 180,000 students in the Detroit Public Schools. To put it in perspective, the next largest school district is Grand Rapids,

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1. Respondents Adamany and the Reform Board acknowledge that Detroit presently is the only school district in Michigan which meets the definition of a "qualifying school district."

2. The statute provides that the Old Board "may" meet as an advisory board and provide input to the Reform Board. *See* M.C.L. § 380.373(1). The Old Board never exercised this option.

3. After five years, *i.e.*, in 2004, the question of whether to retain the Reform Board and the Chief Executive Officer shall be placed before voters of the first class school district. M.C.L. § 380.375.

> which has around 27,000 students . . . I hope that gives you the idea of the magnitude of what happens when children aren't provided the educational opportunity they deserve and how that has repercussions throughout the state, just because of the magnitude.
>
> It has been said by someone else that Detroit is not the worst school district in the state and I won't dispute that, but when you have a district with 180,000 students, and you look at the class of 1998 and see 71 percent missing in action, one has to wonder what happens. Where do those young people go? What is their future; what does this mean for the state of Michigan? . . .
>
> We've waited a long time in this state for improvement, we've heard a lot of new plans — new plans have been coming out of [Detroit] since I've been down here as a legislature [sic] since 1981. I think it is time for fundamental change — major change that will give these 180,000 thousand [sic] students the opportunity to achieve a quality education. They do not have it now and the repercussions to this state and to those students are severe, we've had enough talk and it is time to pass Senate Bill No. 297.

(D Ct Op, at 3-4 (R. 84)).

The Legislature confirmed its intent of making PA 10 open-ended through the enactment of Public Act 230 of 2000, to make clear that the reform legislation applied to any school district in the State of Michigan that qualified (in terms of pupil count) on the date of enactment and to any school district that may become qualified in the future.

In enacting PA 10, the Legislature acted within its constitutional mandate to encourage, maintain and support public education in Michigan. MICH. CONST. art. VIII, §§ 1, 2.

C. Dr. Adamany Is Selected As Chief Executive Officer and Submits The School Improvement Plan.

On May 12, 1999, the Reform Board selected Dr. David Adamany, the former President of Wayne State University and a well-known figure in the Detroit community, to tackle the enormous responsibilities of CEO. Pursuant to PA 10, within 90 days of his appointment, Dr. Adamany was obligated to develop and submit to a School District Accountability Board a School District Improvement Plan that included detailed academic, financial, capital, and operational goals and benchmarks for improvement, as well as a description of strategies to be used to accomplish these goals and benchmarks. M.C.L. § 380.373(7).

In July, 1999, Dr. Adamany presented the Preliminary School Improvement Plan ("PSIP") to the Reform Board and to the School District Accountability Board. (D Ct Op, at 6 (R. 84)). Dr. Adamany, through the School Improvement Plan, arrived at a number of conclusions, many similar to those reached by the New Detroit Review Panel two years earlier and which support the Legislature's actions:

1. Detroit is indeed a district in deep distress.
2. Detroit students are graduating at about two-thirds the rate of other Michigan students.
3. Grade 11 Detroit Public Schools students[4] are 27.1%

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4. Petitioners attempt to make much of the alleged point that DPS students are outperforming students from many other districts. Their attempt is misleading because: (1) Petitioners typically cite (Cont'd)

behind the statewide average in reading; 27.2% in writing; 41.2% in math, and 38.5% in science.[5]

4. *None* of Detroit's fiscal or administrative operations meets acceptable standards.

5. Detroit Public Schools facilities are badly deteriorated and in most cases significantly outdated.

The Plan emphasized the significance of the problems faced by DPS:

> The distress of the Detroit Public Schools is no small matter. Its greatest impact falls on the 180,000 young people who study in the district. But it also affects the future of the City: if Detroit is to prosper, it must have an educated work force; if it is to have vibrant self-government, it must have an educated citizenry. The distress of the Detroit Public Schools spreads well beyond the

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(Cont'd)
fourth grade statistics. A key problem with DPS is that the longer students remain in the system, the worse they do in comparison to state-wide peers; (2) As stated by Representative Buzz Thomas, the alleged defense of DPS serves to underscore the magnitude of the problem:

> We have reacted in a zealously defensive manner, citing facts and figures showing that the Detroit schools, while not perfect, are not the absolute worst. How far have we fallen when our schools are in such a state that anything apart from total ineptitude serves as a measure of acceptable performance?

(Exhibit F in support of Defendants' motion for summary judgment, 3/2/99 Memo from Rep. Thomas, Apx. at 407 (R. 66)).

5. These findings are hardly unique. (Exhibit G in support of Defendants' motion for summary judgment, Apx. at 412 (R. 66)).

> district's borders because of Detroit's size and centrality. Forty-eight percent of Wayne County's students, future workers, and future citizens are enrolled in the district; twenty-five percent of the tri-county metropolitan area's and ten percent of the state's students are here. As every metropolitan region in America is discovering, its future is tied inextricably to its central city. The future of central cities rests foremost on their school systems. So it is in Detroit.

(D Ct Op, at 5-7 (R. 84)). Not even Petitioners dispute Dr. Adamany's findings. *See* Petition For A Writ Of Certiorari, at 9 n.7.

In June 2000, Dr. Adamany revisited each area of concern listed in his Report to the School Reform Board. (Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, Apx. at 524 (R. 66); D Ct Op, at 7 (R. 84)). In addition, he highlighted the Old Board's failure to utilize $1.5 billion in bonds, approved by the Detroit voters in 1994 for physical improvements to Detroit's schools.[6] (D Ct Op, at 7 (R. 84)). Under PA 10, the District, through the CEO and the Reform Board, must report to the Mayor, Governor and Accountability Board in regard to the School Improvement Plan and the progress being made in achieving Plan goals. Further, the Accountability Board can make recommendations as to additional resources and changes in statute or rules necessary to achieve the stated goals. M.C.L. §§ 380.373, 380.376. Thus, the Legislature ensured that there

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6. Indeed, Dr. Adamany concluded that the Old Board's use of its bonding authority "reveals a record of poor planning, incompetence, and waste." (Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, at 22-26, Apx. at 545-49 (R. 66)).

would be oversight of the reform process and, through the Accountability Board, that it would remain informed about the reform process and any proposed changes to the reform process. *Id.*

D. Detroit and Michigan Witness Changes in DPS in the Reform Board's First Year.

In the thirteen months Dr. Adamany served as CEO, Detroit's students, teachers, parents and the remainder of the community witnessed many changes. Dr. Adamany and the Reform Board aggressively recruited and hired over 700 new teachers, implemented a program to reduce class size in grades 1 through 3, spent an unprecedented $79 million in the summer of 1999 to repair school buildings, implemented a promotion policy requiring students to achieve a grade of "C" or better in reading and mathematics and attend summer school, developed a seven-year plan for utilizing bond proceeds to renovate 50 buildings and construct 69 new schools, developed a plan to reduce certain administrative budgets in order to channel more funds to schools in an effort to implement site-based management of schools (including the removal of principals and assistant principals from collective bargaining agreements), and outsourced the information technology department. (D Ct Op, at 7-8 (R. 84); Exhibit L in support of Defendants' motion for summary judgment, 1999-2000 Report, Apx. at. 524 (R. 66)).

In May 2000, the Reform Board hired a permanent CEO, Dr. Kenneth Burnley, to continue the changes begun in its first year. At all times, every member of the Reform Board appointed by the Mayor of Detroit has been African American, with the exception of one Hispanic appointee. Dr. Burnley is African American. Only one member of the seven-member Reform Board, the representative from the State of Michigan Department of Education, is Caucasian.

SUMMARY OF REASONS FOR DENYING THE WRIT

This case involves a revision to Michigan's school code designed to help the state's largest school district reverse deep-seated fiscal and administrative disarray, declining test scores and excessively high dropout rates. The Michigan Legislature, similar to state legislatures throughout the country, designed and enacted 1999 PA 10 for the purpose of addressing the unique problems faced by the Detroit Public School District, Michigan's largest school district. Statutes placing control of school districts in the hands of city mayors, similar to PA 10, have withstood constitutional challenge. *See Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999) (Cleveland); *Bricklayers Union Local 21 v. Edgar*, 922 F. Supp. 100 (N.D. Ill. 1996) (Chicago); *Welch v. Bd. of Ed. of Baltimore County*, 477 F. Supp. 959 (D. Md. 1979) (Baltimore); *Cohen v. New York*, 52 Misc. 2d 324, 275 N.Y.S.2d 719 (1966) (New York City).

Under PA 10, the Detroit Public Schools is now managed by a chief executive officer, who was selected by a reform board of education appointed by the Mayor of the City of Detroit, the highest elected official in the City. With the exception of one representative from the State of Michigan Board of Education appointed to the new reform board by operation of the school code amendments, the District's CEO, the members of the reform Board of Education, and the Mayor of the City of Detroit are all African-American citizens.

Petitioners claim that the statutory change from an elected board of education to a board appointed by the Mayor of the City of Detroit *ipso facto* triggers a violation of § 2 of the Voting Rights Act. Petitioners simply assert that even though no court has ever applied § 2 to an appointive system, § 2 should apply to the shift or change from an elective to an

appointive system because such a change would be captured by § 5 of the Act. Petitioners identify absolutely no authority for the proposition that § 2 can be invoked in a jurisdiction not covered by § 5 to prohibit a change from an elected to an appointed school board.[7] Moreover, Petitioners fail to establish that they have any constitutional or statutory right to an elected rather than an appointed board of education and an appointed CEO.

This is not a preclearance case brought under § 5, the only cases cited by Petitioners and *Amici* in support of the petition. Nor is this a vote dilution case under § 2 of the Voting Rights Act for the simple reason that the offices challenged by Petitioners are appointive, not elective, and Petitioners make no claim that their ability to elect the Mayor of the City of Detroit has in any way been impaired. This Court has never applied § 2 of the VRA to invalidate a state government's inherently political decision of establishing appointive boards of education in lieu of elected ones. The criterion for determining whether the mayor of a city in Michigan appoints the board of education, which in turn appoints a CEO to operate the school district, is strictly the size of the student population served (more than 100,000). While the Detroit Public Schools is the only school district in the State of Michigan at the present time which qualifies for an appointive board of education, the school reform legislation is open ended and is neither race conscious nor invidious. In holding that § 2 of the Voting Rights Act does not apply to the appointive system created by the new legislation, both the District Court and the Sixth Circuit were

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7. Section 5 of the VRA applies only to states with a record of voting discrimination. *See Allen v. Bd. Of Elections*, 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Section 5 does not apply to Michigan. 28 C.F.R. § 51.4.

faithful to this Court's prior decisions applying § 2 of the VRA and construing its scope. A voting practice or procedure which requires preclearance under § 5 of the VRA is not necessarily subject to challenge under § 2. The Petition does not meet the standards justifying review on certiorari. Sup. Ct. R. 10. The Petition should be denied.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT PROHIBIT A CHANGE FROM ELECTIVE TO APPOINTIVE POSITIONS FOR LOCAL SCHOOL BOARDS.

A. The Sixth Circuit's Holding Below And its Prior Decision In *Mixon v. Ohio* Correctly Interpret the Scope of § 2 of the Voting Rights Act.

In *Mixon v. Ohio*, a case factually similar to the present case, the Sixth Circuit held that § 2 of the VRA applies only to **elective, *not* appointive**, processes of selecting state or local officials. *Mixon*, 193 F.3d at 407. In *Mixon*, the Ohio Legislature enacted a statute allowing the Mayor of Cleveland to appoint a new school board. Because the Court of Appeals in *Mixon* found that § 2 of the VRA did not apply to appointive processes, it held that the VRA did not apply to the appointed school board. In both *Mixon* and the decision below, the Sixth Circuit relied upon the Supreme Court's observation that a state could avoid application of the VRA by changing from an elective to an appointive system. *Chisom v. Roemer*, 501 U.S. 380, 401, 404, 111 S. Ct. 2354, 2367, 115 L. Ed. 2d 348 (1991) (discussing state judicial elections); *see also Sailors v. Board of Ed. Of the County of Kent*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d (1967) (holding that voters did not have a right to elect members of the county board of education, who were chosen by delegates from local

school boards and finding that there was no constitutional prohibition on using an appointive system to select officials of nonlegislative character). (6th Cir. Op., at 19, 23.)

In its decision below, the Sixth Circuit also specifically rejected Petitioners' claims that because § 5 applies to changes from elective to appointive systems and because §§ 2 and 5 contain similar language, § 2 *ipso facto* also covers such transitions. (6th Cir. Op., at 24). As discussed *infra*, §§ 2 and 5 are not identical and serve different purposes. For this reason and as noted by the *Mixon* court, every other federal court that has addressed the issue of appointive processes has determined that § 2 applies only to elective processes. *See Mixon*, 193 F.3d at 407 (citations omitted).

B. Section 2 Of The Voting Rights Act Differs From § 5 In Its Purpose, Text, And Application Such That A State's Decision To Replace An Elective Process With An Appointive Process May Be Covered Under § 5 But Not Covered Under § 2.

Petitioners' argument in chief is that the Sixth Circuit's holding that § 2 does not apply to a shift from an elective to an appointive system is incorrect because the coverage and substantive standards of § 2 and § 5 of the VRA are identical. Petitioners contend that because § 5 applies to a change from an elective to an appointive process in jurisdictions that must comply with § 5, § 2 also covers such a change in all jurisdictions where the change impacts minorities. Petitioners' argument is a *non sequitur*. It must fail given the purpose, text, and application of §§ 2 and 5 and prior Supreme Court decisions.

Congress enacted the VRA in an effort to ensure that discriminatory state laws would not interfere with citizens' equal enjoyment of the right to vote. *See South Carolina v.*

Katzenbach, 383 U.S. 301, 308-15, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). In enacting § 2 and its later amendments, Congress sought to eradicate voting practices that minimize the voting strength of minority groups. *See Reno v. Bossier Parish School District*, 520 U.S. 471, 479, 117 S. Ct. 1491 (1997) (citations omitted) ("Bossier Parish I"). In enacting § 5, Congress took extra steps with regard to particular jurisdictions with a history of discriminatory voting practices. *See* 42 U.S.C. § 1973(b). In these § 5 jurisdictions, the Attorney General or the federal courts must approve any proposed change to a voting practice. 42 U.S.C. § 1973c.

Congress recognized § 5 as an extraordinary encroachment on the sovereign powers of the states to promulgate laws in general and voting legislation in particular. *See Katzenbach*, 383 U.S. at 334 86 S. Ct. 803. Such intrusions into the sovereign powers of states lacking such a pernicious history are unwarranted. Against this backdrop, to construe §§ 2 and 5 as identical would be contrary to Congress' intent in enacting the statute.

There are clear differences apparent in the text of § 2 and § 5. Section 2 prohibits states and political subdivisions from maintaining voting "standards, practices, or procedures" with respect to the nomination or election of representatives that hinder a citizen's right to vote based on race. Section 2 provides in pertinent part:

> (a) [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

> (b) a violation of subsection (a) of this section is established if .it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to elect representatives of their choice. . . .

42 U.S.C. § 1973.

On the other hand, Section 5 establishes a preclearance procedure for certain states with a history of discriminatory voting practices who desire to implement any change to a voting standard, practice, or procedure post 1964. Section 5 provides in pertinent part:

> [w]henever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . different from that [previously] in force or effect so as to ensure that it does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . .

42 U.S.C. § 1973c.

Upon examining the plain language of both sections, it is clear that § 2's coverage of procedures related to the *nomination* and *election* of representatives and § 5's coverage of *any* change — not just those affecting elections and nominations — is an important difference between the two sections. Moreover, § 2 covers all states where voting discrimination may occur and § 5 applies to only certain states with a history of discriminatory voting practices. Another

critical difference, obvious from the text, is that § 5 instructs that covered jurisdictions obtain preclearance of voting changes whereas there is no such requirement in § 2 and those jurisdictions not covered by § 5. Finally, and most obviously, if Congress had intended § 2 to be the same as § 5, there would have been no need to promulgate two separate sections. Thus, Petitioners' contention that §§ 2 and 5 are the same despite these important differences in the text is ill founded.

Contrary to Petitioners' insistence, this Court has already rejected the claim that the fact that a change in a voting practice must be precleared under § 5 necessarily means that the voting practice is subject to a dilution suit under § 2. *See Holder*, 512 U.S. at 882-83, 114 S. Ct. 2581. In *Holder*, this Court held that adherence to a single-commissioner form of county government and the failure to adopt a multimember commission, even though authorized by a Georgia statute, was beyond the scope of § 2 of the VRA. In a plurality opinion, this Court stated:

> It is true that in *Chisom v. Roemer* . . . we said that the coverage of §§ 2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). We did not adopt a conclusive rule to that effect, however, and we do not think that the fact that a change in a voting practice must be precleared under § 5 necessarily means that the voting practice is subject to challenge in a dilution suit under § 2.

Id.

Justices Kennedy and Rehnquist went further to note that if the structure and purpose of §§ 2 and 5 were identical then the case for interpreting the two sections to have the same

application in all cases would be convincing. *Id.* at 883, 114 S. Ct. 2581 (plurality opinion). The Justices noted, however, that "the two sections differ in structure, purpose, and application." *Id.* Furthermore, in providing examples of cases where voting practices would not be subject to § 2 even though the practices could be subject to § 5, the Court expressed doubt as to whether Congress contemplated that a racial group could bring a § 2 dilution challenge to an appointive office even though the same challenge could be brought under § 5. *Id.* at 884, 114 S. Ct. 2581 (discussing specifically *McCain v. Lybrand*, 465 U.S. 236, 104 S. Ct. 1037, 79 L. Ed. 2d 271 (1984), where the Court held that a change from an appointive to an elective office is covered under § 5). Interestingly, in spite of this strong language to the contrary, Petitioners cite *Holder* in support of their argument that §§ 2 and 5 are identical.

Moreover, in *Bossier Parish I*, the Court considered a Louisiana parish school board's request for § 5 preclearance for its proposed redistricting plan. The Court held that a proposed voting change could not be denied solely on the basis that a covered jurisdiction's new "standard, practice, or procedure" possibly violated § 2. Noting that a claimant can succeed under § 2 based on a finding of discriminatory effect but not succeed under § 5 because of a lack of retrogression, the Court stated, "[this Court] has consistently understood these sections, to combat different evils and, accordingly, to impose very different duties upon the states." *Id.* at 477, 117 S. Ct. 1491 (citing *Holder*, 512 U.S. at 883 114 S. Ct. 2581; *cf. Morse v. Republican Party of Virginia*, 517 U.S. 186, 282, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (Thomas, J., dissenting) (voting practice that is outside the scope of the preclearance provision because it is implemented in a noncovered jurisdiction may nonetheless be challenged in a lawsuit under § 2; legislative history expressly states

that not every action that can be brought under § 2 falls within the scope of § 5).

Petitioners cite *Bossier Parish II*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000), for the proposition that § 5 is broader than § 2 and because § 5 applies to a shift from an elective to an appointive process, § 2 also applies to such a shift. In *Bossier Parish II*, this Court held that preclearance under § 5 does not amount to approval under § 2. *Bossier Parish II*, 528 U.S. at 333-34, 120 S. Ct. 866. Preclearance is only a determination that the change is no more dilutive than what it replaces and therefore the change in voting practice cannot be precluded but can be attacked through a § 2 action. *Id.* at 335, 120 S. Ct. 866. Citing *Bossier Parish I*, in *Bossier Parish II*, the Court again refused to "blur the distinction between § 2 and §5" and exacerbate the federalism costs that the preclearance requirement procedure already exacts. *Id.* at 366, 120 S. Ct. 866. Like *Holder*, *Bossier Parish II*, simply does not support Petitioners' claim that the 1999 revisions to Michigan's School Code trigger a § 2 violation.

Certainly there are some instances in which § 2 applies to procedures also covered by § 5 (e.g., *Chisom*, 501 U.S. 380); however, those are cases where the actual voting standard, practice, or procedure in a § 5 jurisdiction is also covered by § 2. For example, a complainant can wage a § 5 challenge to state judicial elections as well as a § 2 challenge because § 2 also applies to *elections*. *Chison*, 501 U.S. 380. This scenario is contrary to that presented in the present action because § 2 does not apply to appointive systems. *See* cases cited in Section II.C, *supra*. Thus, even in a § 5 jurisdiction, once a change to an appointment process has been approved, a challenge to the appointment process can not be maintained under § 2.

These differences between § 2 and § 5 indicate that Congress did not intend the sections to be the same. Indeed, the fact that § 5 is limited to certain jurisdictions implies that Congress intended and allowed in other jurisdictions, like Michigan, flexibility to change from an elective to an appointive system without facing challenges under the Voting Rights Act. *See Mixon*, 193 F.3d at 408. This is particularly true where reform is addressed to a state's capacity to improve delivery of educational services to students most in need and where an ability to experiment is critical. *Id.* at 406.

Petitioners in effect urge this Court to incorporate § 5 into § 2. Congress did not intend this result in enacting these two distinct sections of the Voting Rights Act. With this in mind, it is unsurprising that this Court and other federal courts have declined to allow § 2 to be swallowed by § 5. The legislature had the opportunity to add into the VRA language indicating that every action subject to § 5 is subject to § 2. Congress declined to include such language. Should this Court do as Petitioners suggest and find that §§ 2 and 5 are identical, such a ruling would undermine the purpose for enacting two distinct sections of the VRA and essentially rewrite § 2 to extend to appointive processes and overhaul § 5 to cover all states.

C. Courts That Have Considered Voting Rights Act Claims Attempting To Apply § 2 To Appointive Systems Have Routinely And Consistently Denied Such An Application.

The Michigan legislature has chosen, as one of many efforts designed to strengthen and reform the educational system in Detroit, to install an appointive system for selecting school board members. Petitioners cite not a single case to refute the position that § 2 applies to neither appointive offices nor a shift from an elective process to an appointive

process. Petitioners cite none because no such cases exist. To the contrary, federal courts that have considered the question of § 2's applicability to appointive offices have unanimously concluded that § 2 applies to elective, not appointive offices. Quite notably, these cases span seven different federal circuits. *See Mixon*, 193 F.3d at 407-08 (appointive offices do not fall within the ambit of the § 2); *African-American Citizens for Change v. St. Louis Bd. of Police Comm'rs*, 24 F.3d 1052, 1054 (8th Cir. 1994) (challenge to a state statute granting the governor power to appoint four out of five Police Commissioners, court stated that "§ 2 of the Voting Rights does not apply to appointed officials."); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989) ("it appears more probable than not that § 2 is not applicable to appointive offices."); *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987) (holding that § 2 applies to a change in the number of *elected* at-large commissioners, court stated that "[t]he language [of § 2] is only and uncompromisingly premised on the fact of nomination or election."); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. 1981), *aff'd*, *Hightower v. Searcy*, 455 U.S. 984, 102 S. Ct. 1605, 71 L. Ed. 2d 844 (1982) (challenge to an appointive system for a local school board, court held that "this case involved an appointive rather than an elective scheme, and thus the district court was correct in holding that voting rights did not apply."); *Holley v. City of Roanoke, Alabama*, 162 F. Supp. 2d 1335 (E.D. Ala. 2001) (§ 2 did not apply to an appointive rather than an elective system for selecting members to the board of education); *African-American Legal Defense Fund, Inc. v. New York*, 8 F. Supp. 2d 330, 340 n.14 (S.D.N.Y. 1998) (challenge to an appointive system for members of the New York City's Board of Education and Community School Boards, court held that § 2 of the Voting Rights Act was inapplicable because this

was a purely appointive process); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1122-23 (E.D. Mo. 1997) (challenge to an appointive system for selecting judges that included a subsequent retention election system; court held that § 2 did not apply to the appointment of judges, but did apply to the subsequent retention elections); *Prewitt v. Moore*, 840 F. Supp. 436, 440 (N.D. Miss. 1993) (challenge to a purely appointive system of filling judicial vacancies and appointing temporary judges, court held that "§ 2 is inapplicable to appointive offices . . . [it] covers elected officials only."); *Bradley v. Indiana, State Election Bd.*, 797 F. Supp. 694, 698 (S.D. Ind. 1992) (§ 2 applies to retention elections for judges but not to the initial appointment of those judges); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1568 (N.D. Ill. 1988) (challenge to an appointive system where regular Circuit Court elected judges appointed Associate Circuit Court judges, court held that "[t]he Voting Rights Act covers elected officials only.").

A review of the courts' reasoning in a sampling of these cases illustrates the predominate view of the scope of § 2 with regard to appointive systems. These courts have begun their discussion with a review of § 2, calling particular attention to important language in § 2: "political processes leading to nomination or election" and "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Courts note that the plain language of § 2 compels the conclusion that § 2 does not apply to appointive offices. *See Mixon*, 193 F.3d at 407 (§ 2 refers to the election and nomination of representatives); *African-American Citizens for Change*, 24 F.3d at 1054 ("§ 2 is expressly limited to 'the political processes leading to nomination or election' of state and local officials."); *Dillard*, 831 F.2d at 251 (§ 2 premised on the fact of nomination or election); *Holley*, 162 F. Supp. 2d at 1341 (rights being protected by § 2 are the right to vote and the opportunity to elect).

Moreover, in looking to this Court for wisdom on the question of whether § 2 applies to appointive offices, lower courts have found guidance in *Chisom*, 501 U.S. at 404, 111 S. Ct. 2354.[8] In *Chisom*, this Court considered whether judicial elections were within the scope of § 2 of the VRA. Holding that such elections are within the scope of § 2, the Court stated in dicta that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by *changing* to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion." *Id.* at 401, 111 S. Ct. 2354 (emphasis added). By this statement, the Court implied not only that the VRA does not apply to appointive offices, but even more applicable to the matter presently before this Court, the Court suggested that a *change* from an elective to an appointive system for selecting judges would not trigger the VRA, at least so far as § 2 is concerned.

Petitioners do not challenge — indeed, Petitioners wholly ignore — the body of cases harmoniously holding that § 2 is inapplicable to appointive systems. Presumably then, Petitioners ask this Court to do the same or alternatively, to disregard the plain language of § 2, overrule all of the lower courts that have considered this issue, and abandon important dicta in *Chisom*.

Amici, on the other hand, acknowledge that § 2 does not apply to appointive systems; however, *Amici* submit that this is irrelevant. *Amici* argue that § 2 does not apply to systems that are *historically* appointive, but does apply to changes in voting systems where the new system has a racially disparate impact on minorities. (*Amici* Brief at 16.) *Amici*'s argument falls short in its attempt to dispel the importance of § 2's

8. All post *Chisom* cases mentioned in this section cite *Chisom* to support the conclusion that § 2 does not apply to appointive offices.

inapplicability to appointive offices and the body of cases addressing this issue. First, cases interpreting § 2 make no distinction between historically appointive systems and newly appointive systems. Second, the cases interpreting § 2 and indeed, § 2 by its language, addresses systems in their challenged form. Where a § 2 challenge is applicable, courts consider challenges to voting systems not by comparison to a system predating the change (as mandated by § 5), rather the voting system is examined in its present form to determine whether the system has an adverse impact on minorities. Importantly, only certain systems are subject to scrutiny under § 2. An appointive system, like the system the Michigan legislature has chosen, is not subject to § 2.

II. SECTION 2 OF THE VOTING RIGHTS ACT COVERS VOTING QUALIFICATIONS, PREREQUISITES TO VOTING, AND STANDARDS, PRACTICES, OR PROCEDURES WITH RESPECT TO VOTING AND DOES NOT EXTEND TO THE SIZE OR FORM OF A GOVERNING AUTHORITY.

In both the decision below and in *Mixon v. Ohio*, the Sixth Circuit Court of Appeals correctly determined that § 2 of the Voting Rights Act does not apply to appointive offices of a local Board of Education. Under the plain terms of the Act, § 2(a) covers only a defined category of state actions. Only "voting qualification[s]," "prerequisite[s] to voting," or "standard[s], practice[s], or procedure[s]" are subject to challenge under the Act. In his concurring opinion in *Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994), Justice Thomas made clear that the type of state law that may be challenged under § 2 is addressed explicitly in § 2(a), which defines and explicitly limits the type of voting practice that may be challenged under the Act. 512 U.S. at 924, 114 S. Ct. 2581. In regulating standards, practices and

procedures, § 2(a) reaches only "those states laws that [relate to] either voter qualifications or the manner in which elections are conducted." *Allen*, 393 U.S. at 591, 89 S. Ct. 817 (Harlan, J., concurring in part and dissenting in part).

Similarly, in order for a party to establish a violation of the VRA pursuant to § 2(b), it must be shown that members of a minority have less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice. 42 U.S.C. § 1973(b) (emphasis added). The Supreme Court has held that any challenged standard, practice or procedure must have *both* of these effects to violate the test outlined in § 2(b). *See Chisom*, 501 U.S. at 397, 111 S. Ct. 2354.

Probably for this reason, this Court has never utilized § 2 of the Act to impose upon a state or political subdivision a certain form of government; and for this reason as well, Petitioners cite no case for the proposition that § 2 of the VRA has been used to invalidate the creation of appointive offices for a school board.

The form of local school district governance is inherently a question for the State of Michigan to determine. Petitioners and *Amici* suggest that, in spite of its duty to the educate Michigan's children, the Legislature cannot act unless and until the educational programming and management of the Detroit Public Schools deteriorates to such a point that judicial intervention and monitoring becomes necessary. Such a restriction truly removes power from the citizens of Michigan and represents extreme intrusion upon state sovereignty.

Justice Thomas instructed:

> Reading the words in context strongly suggests that § 2(a) must be understood as referring to any

> standard, practice, or procedure with respect to voting. And thus understood, the terms of the section would not extend to the size of a governmental body; we would not usually describe the size or form of a governing authority as a "practice" or "procedure" concerning voting.

512 U.S. at 915, 114 S. Ct. 2581 (emphasis in the original).

Justice Thomas cautioned against an expansive reading of § 2:

> In my view, the tension between the terms of the Act and the construction we have placed on § 5 at the very least suggests that our interpretation of § 5 should not be adopted wholesale to supply the meaning of terms "standard, practice, or procedure" under § 2 of the Act.

Holder, 512 U.S. at 930, 114 S. Ct. 2581.

The Michigan Legislature changed the form of governance of school districts comprised of 100,000 or more students. Instead of governance by school board members who share equally in executive and rule-making responsibilities, the management of qualifying school districts is now vested in a CEO, selected by appointed school board members. Changes in the form of government are within the state's sovereign powers and beyond the scope of the VRA.

Accordingly, even though a change in the size of a county board or commission is a change in a "standard, practice, or procedure" for purposes of the pre-clearance procedure in § 5 of the Act, such a voting practice is not necessarily subject to prohibition under § 2 of the Act. *See Holder*, 512 U.S. at 884, 114 S. Ct. 2581. The same result should obtain for changes in the form of government.

III. PETITIONERS' CLAIM ALSO FAILS BECAUSE PA 10 DOES NOT AFFECT MINORITIES' FUNDAMENTAL RIGHT TO VOTE.

The United States Supreme Court and the Sixth Circuit have recognized that state legislatures need the freedom to develop strategies to improve education. *See Sailors*, 387 U.S. 105, 87 S. Ct. 1549; *Mixon*, 193 F.3d 389. Public Act 10 is an effort by the Michigan Legislature to do just that: develop a plan to improve the educational opportunities of students in Michigan's largest school district. Toward this end, this Court has already determined that Petitioners have no fundamental right to an elective board of education *vis-à-vis* an appointed one. Petitioners simply do not have a fundamental right to elect members of the Detroit School Board. *See Sailors*, 387 U.S. at 105 (6th Cir Op. at 19).

All that Petitioners have alleged — and all that they can prove — is that PA 10 applies to a school district that is predominantly African American.[9] However, Petitioners do not inform the Court that five members of the seven-member Reform School Board have been appointed by the Mayor of the City of Detroit are African American, and one member appointed by the mayor is Hispanic. PA 10 has therefore produced no discriminatory results in the composition of the Reform School Board or the race of the CEO. *See African-American Citizens for Change v. Robbins*, 825 F. Supp. 885 (E.D. Mo. 1993), *aff'd*, 24 F.3d 1052 (8th Cir. 1994) (district court dismissed plaintiffs' case because plaintiffs failed to allege that the appointive system for selecting Police Board members produced discriminatory results, particularly since 2 of the 4 appointed members of the board are African American). Moreover, appointed school board systems are

9. It should be noted that much of the alleged factual material referenced in the *Amici* brief is *dehors* the record.

permissible under the Constitution so long as the appointments are not made in a manner that systematically excludes an element of the population from consideration. *See Searcy*, 656 F.2d at 1009 (citing *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S. Ct. 1323, 39 L. Ed. 2d 630 (1974).

In addition, what Petitioners would have this Court overlook is that PA 10 has no application to, and no impact whatsoever on, the numerous other districts in the State that are predominantly or even marginally African American.[10] Petitioners' claim must also fail because they have not and cannot point to any objective factors which demonstrate that minorities do not have equal access to the process of nominating and electing their representatives. *See Thornburg v. Gingles*, 478 U.S. 30, 73, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); *Ortiz v. City of Philadelphia Office of the City Comm'ners Voting Registration Div.*, 28 F.3d 306 (3d Cir. 1994). They cannot satisfy the dual criteria for finding a violation pursuant to § 2(b) of the Act.

In sum, the Michigan Legislature chose to replace its elective system for filling school board positions with an appointive system. Section 2 dictates and federal courts have unwaveringly held that appointive systems are not subject to § 2 of the VRA. Thus, Petitioners have failed to present an issue warranting this Court's review.

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10. These Michigan cities include Flint, Highland Park, Inkster, Pontiac, Southfield Jackson, Kalamazoo, Lansing, Grand Rapids and Romulus.

CONCLUSION

Wherefore, Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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